Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1558

THOMAS H. THEODOSOPOULOS,
Petitioner

v.

STATE OF NEW HAMPSHIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

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MISCELLANEOUS

N.H. Superior Court Rule 96. 15

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

The Petitioner, Thomas H. Theodosopoulos, through counsel, respectfully prays that a Writ of Certiorari issue to review the decision and order of the Supreme Court of New Hampshire, issued August 17, 1979 and modified January 4, 1980.

OPINIONS BELOW

A copy of the opinion of the Supreme Court of New Hampshire is attached hereto as Appendix A. It is a published opinion which has not been given an official

citation as of the date of the printing of the Petition herein. The Petitioner [hereinafter referred to as defendant] is informed however, that the opinion will be printed in Volume 119 of the New Hampshire Supreme Court Reports. The decision was originally rendered by the New Hampshire Supreme Court on August 17, 1979 and distributed September 14, 1979. The defendant filed a timely motion for rehearing on September 24, 1979. See Appendix C. On January 24, 1980, the Supreme Court of New Hampshire denied the defendant's motion for rehearing and modified its opinion of August 17, 1979. Appendix A reflects both the original opinion of the Supreme Court of New Hampshire of August 17, 1979 and its modifications (in manuscript) of January 4, 1980. As indicated by the order of the Court and the cover letter to counsel from the Clerk of Court, the New Hampshire Supreme Court order and modification of January 4, 1980 were issued and distributed on January 7, 1980.

A copy of the opinion of the trial Court, the Hillsborough County Superior Court, unpublished, is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the decree of the New Hampshire Supreme Court is provided by 28 U.S.C. §1257(3). The decree sought to be reviewed is the opinion and order of the New Hampshire Supreme Court of August 17, 1979 (distributed September 14, 1979), as modified by the Court on January 4, 1980 and issued on January 7, 1980.

QUESTIONS PRESENTED

1. Did the New Hampshire Supreme Court erroneously determine, upon the facts of this case, that sufficient objective probable cause

and exigent circumstances existed to justify the warrantless entry into are search of the defendant's apartment?

2. Does a warrantless nighttime entry into and search of a citizen's home require a higher degree of probable cause than that which will support the issuance of a warrant?

3. Must evidence obtained as a result of a warrantless nighttime entry into and search of a citizen's home be excluded in a criminal prosecution where the police officers executing the entry and search did not subjectively believe that evidence would probably be found or that an emergency existed?

CONSTITUTIONAL PROVISIONS

At issue in this case is the Fourth Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 12:50 a.m., December 31, 1977, a single gunshot was fired in the Manchester Police Station, Manchester New Hampshire, simultaneously injuring Manchester Police Captain Xiggoros and Mrs. Dorothy Perreault, a civilian. At the time, Mrs. Perreault was standing at the desk in the lobby of the Police Station talking to Captain Xiggoros about a complaint she was making against her son, Bruce Perreault. Several hours before the shooting in question, Mrs. Perreault had complained that her son had pointed a gun at her. As a result, she had been brought into the Police Station "for safety".

Soon after the shot was fired, Captain Xiggoros stated, "get that little so and so. He just shot me." Because of the nature of Mrs. Perreault's complaint and the statement of Captain Xiggoros, the Manchester Police Department assumed that the shot had been fired by Mrs. Perreault's son, Bruce, and that the intended victim had been Mrs. Perreault.

As a result of the shooting, the Manchester Police Department mobilized and called in a number of its off-duty officers.

The initial assumption of the police officers was that the shot which had injured Captain Xiggoros and Mrs. Perreault had been fired from inside the Police Station itself and that the assailant was still in the Station. Consequently, the

lights in the Police Station were turned out, the Station was cordoned off and a search was conducted of the inside of the Station. After an unsuccessful search of the interior of the Station revealed that the assailant was not present, the injured Captain Xiggoros and Mrs. Perreault were removed to a hospital by ambulance.

One group of Officers was then dispatched throughout the City in an attempt to locate the assumed assailant, Bruce Perreault, wherever he might be found. At the same time, an attempt was made to reconstruct the circumstances of the shooting. When Captain LeBoeuf had entered the Police Station soon after his arrival, he had come through the front door of the Station on Chestnut Street and noticed an apparent bullet hole in the front window. Having determined that the assailant was not inside the Station, the police then deduced that the hole in the window had been made by a bullet fired from the outside of the Station.

At this point, Sargent Durette was instructed to deploy his "Special Reaction Team" to conduct a search for the assailant (still assumed to be Bruce Perreault) immediately outside the Station. Sargent Durette testified that a Special Reaction Team is, "a team of men especially trained to respond to hostage, sniper or other situations". On this particular evening, the full Team consisted of eighteen officers, including Sargent Durette.

By the time that it was determined that the shot had been fired from outside the Station and Sargent Durette and his Team had left the Station, it was between 1:45 a.m. and 1:50 a.m. or approximately one hour after the shooting. As stated above, another group of police officers had already commenced their effort specifically to locate Bruce Perreault elsewhere in the City of Manchester.

Initially, Sargent Durette took his Team to an abandoned church building located at the intersection of Chestnut and Merrimack Streets. This building is located across Chestnut Street from the Police Station, to the left front of the Station. A search of the church building proved to be negative. At that point, Sargent Durette positioned his men around the church building under the supervision of Sargent Tanguay and returned to the Station.

Back at the Station, Sargent Durette conferred with Captain Murphy. An attempt was then made to determine the approximate trajectory of the bullet which had struck Captain Xiggoros and Mrs. Perreault. Lining up the victims' location at the time of the shot and the bullet hole in the window, Sargent Durette concluded that the shot apparently had been fired from somewhere to the right front of the Police Station. This was in the direction of a series of buildings extending down Manchester Street perpendicularly from Chestnut Street away from the front of the Station.

For the first time during the evening, the investigation now focused upon the buildings located on Manchester Street (one of which contained the defendant's apartment). This involved a row of buildings fronted by Manchester Street and backed by an alley. The buildings variously contained shops and apartments and consisted variously of two, three or four storeys. By the time that the Special Reaction Team redeployed and started to search the buildings on Manchester Street, it was between 2:00 a.m. and 2:05 a.m., or approximately an hour and fifteen minutes after the shooting.

Sargent Durette testified that he concluded only that the shot had been fired from "somewhere on the Manchester Street side". He agreed that, "so far as where is concerned, (I) really didn't know". He also agreed that during the approximate hour and fifteen minutes since the initial shot, no other shot had been fired or reported to have been fired. Finally, Sargent Durette stated that during this period, the police "hadn't received any reports from any witness or other person concerning any information about the shooting."

Despite the fact that the Manchester Street buildings had gone unobserved and unattended since the time of the shooting, Sargent Durette testified that:

> Q. It was at this point, I take it, the decision was made you would move down Manchester Street and search <u>every one of these buildings</u>?

> A. <u>That's right</u>.

(Emphasis supplied) Indeed, Sargent Durette stated that it was "our policy and our SOP" that when a building search was conducted, "you didn't leave a building until we searched it thoroughly".

Sargent Durette also testified that all of the members of the Special Reaction Team were aware of the fact that Captain Xiggoros, "one of [our] own men" had been a victim of the shooting. He agreed that this circumstance gave the men "a little extra incentive to go out and do the job."

In order to effectuate the sweep search of all of the buildings along Manchester Street, the Special Reaction Team deployed down Manchester Street in front of the buildings, through the alley to the rear of the buildings and up on the rooftops of the buildings. The first building on Manchester Street that was searched was a "Sub Shop" on the corner of Manchester Street and Chestnut Street. The door was locked, but the police were able to search the building by looking through unobstructed glass windows. The next was a vacant photo shop, which was also empty.

At this point, the Special Reaction Team came to a four storey apartment building containing several entryways. The police entered the first doorway, labeled 83 Manchester Street, which was closed but unlocked. The door, which was the

only entry or exit to the ground floor of the building, opened into a hallway. Members of the Special Reaction Team searched the cellar, which was empty. Sargent Durette then posted one man on the ground floor in the hallway and the balance of his Team (seven men) climbed the stairs to the second floor. In addition, there were other members of the Team posted in the alley to the rear of the building.

Upon reaching the second floor, the officers knocked on a door to the single apartment on that floor. Mrs. Irene Berlinguette, the tenant, answered the door. She was advised by Sargent Durette that there had been a shooting in the area and that the police desired to search her apartment. Upon receiving Mrs. Berlinguette's consent, a search of her apartment was conducted, with negative results.

The search of Mrs. Berlinguette's apartment occurred at approximately 2:15 a.m., about an hour and one-half after the shooting. Mrs. Berlinguette testified at the hearing that the police asked her, "did you hear any noises or gunshots?" and that she responded negatively.

After searching Mrs. Berlinguette's apartment, the police officers proceeded to the third floor of the apartment building, leaving another member of the Team on the second floor. Located on the third floor above Mrs. Berlinguette's apartment was another single apartment. Sargent Durette and his officers pounded on the doors to the third floor apart-

ment with their fists and night sticks, receiving no response whatsoever. Likewise, no noise was heard from inside the apartment. The Officers did observe some light in the apartment from beneath one of the doors.

Sargent Durette then hollered down to Mrs. Berlinguette on the second floor asking her whether or not she had heard any noise upstairs in the apartment above her. She responded that she had not. Sargent Durette also inquired as to the identity of the occupant of the third floor apartment and Mrs. Berlinguette advised him that the tenant was the defendant, Thomas Theodosopoulos. Sargent Durette then asked Mrs. Berlinguette if she knew whether or not Thomas Theodosopoulos was at home. At this point, the testimony given at the hearing is somewhat at odds. Sargent Durette testified variously that Mrs. Berlinguette stated:

1. "If his truck is outside, he must be home."
2. "If his truck is outside, he is home most likely."
3. "If his truck is out there he possibly is home."

In any case, Sargent Durette continued pounding and knocking on the doors to the third floor apartment, still without response. He then sent three men up to the fourth floor apartment, which was searched without event. Simultaneously, other members

of the Special Reaction Team climbed the fire escape on the backside of the building to check the roof.

At that point, the entire Manchester Street sweep search came to a halt. As Sargent Durette testified, "I was determined I wasn't going to leave the building until that building was searched completely." In order to gain access to the locked apartment, Sargent Durette radioed over to the Station to see if the identity of the landlord could be determined and keys to the apartment could be obtained. Somehow the Station personnel determined the identity of the landlord, who lived elsewhere in Manchester, and dispatched an officer to retrieve the keys.

Sargent Durette and his Team waited in excess of one-half hour for the keys to arrive. During this period of time, police officers were stationed to the front of the building on Manchester Street, to the rear of the building in the alley, in the first and second floor hallways and outside the defendant's apartment in the third floor hallway. The lights in the Station had also been turned back on. No additional shots were fired; no noise was heard from inside the defendant's apartment; and the specific search for Bruce Perreault continued.

At some point while Sargent Durette was awaiting the keys to the apartment, Sargent Tanguay radioed from outside and inquired whether or not the Special Reaction Team should continue down

Manchester Street searching the other apartments and buildings. Sargent Durette advised that the sweep would be halted until he had completed a search of the defendant's apartment because it was "our policy and our SOP in building searches".

At approximately 3:00 a.m., over two hours after the shooting, an officer arrived at the building on Manchester Street with a set of keys. Apparently, however, the wrong keys had been obtained because they did not fit any of the doors to the defendant's apartment. After making an abortive attempt to open the doors with the keys, Sargent Durette and his men recommenced banging on the doors with flashlights and night sticks. Again, "no response" was received.

As testified to by Sargent Durette, "then I made the decision to go in". Forceable entry was made by kicking in one of the doors to the apartment. At the time of the entry, no arrest or search warrant had been procured.

The door that was kicked in opened into a living room. A search was made of the living room and an adjoining room, both of which faced Manchester Street. No person was found. The officers then proceeded through an interior hallway into the kitchen. When the officers entered the kitchen, they could see the defendant lying on his bed in a bedroom off the kitchen. The officers immediately "fanned out" to see if there was any other person in the apartment. The only person found was the defendant.

The defendant appeared to be passed out. Sargent Durette attempted to wake the defendant by shaking him, but received no response. In the defendant's bedroom, Officer Durette saw a styrofoam box of 19 empty rifle shells lying on top of a dresser. He also found a rifle scope lying on the dresser, but the scope was "full of dust" and obviously had not been used recently.

The defendant had still not been roused from his condition. Sargent Durette therefore left two men to guard him and "proceeded to check the rest of the apartment." In a room off the kitchen, there was a closet on the back wall with a locked padlock. Sargent Durette grabbed the padlock to see if it would open, but it would not. After searching the "closet room", Sargent Durette continued to check the apartment. In the bathroom, he found a broken pane of glass in the rear window, which faced the back alley. Sargent Durette "hunched down" and looked through the hole in the glass; he was able to see the Police Station and the apparent bullet hole in the window.

After the above-described search of the defendant's entire apartment and the discovery of the evidence indicated, Sargent Durette called the Station and requested the presence of Deputy LeBoeuf. When Deputy LeBoeuf arrived, he was shown all of the various items of evidence

which had been uncovered by Sargent Durette in his search of the apartment. At that point, Deputy LeBoeuf instructed the officers to arouse the defendant and to "take him into custody".

Coincidently, Bruce Perreault had been apprehended at approximately the same time in another section of Manchester. He also was brought to the Station.

At the Station, Sargent Durette briefed Lieutenant Crotty concerning the break-in and search of the defendant's apartment. Lieutenant Crotty then prepared an affidavit for a search warrant based upon the information provided by Sargent Durette. At approximately 6:00 a.m., Lieutenant Crotty took the affidavit to Judge Armand Capistran at his home and a search warrant was issued. The testimony indicated that Judge Capistran, who lives in Manchester, had been at home and available all evening, including when the defendant's apartment was broken into.

The purpose of the issuance of the search warrant was to conduct a search of the padlocked closet in the defendant's apartment. The second search commenced at 6:24 a.m. Now armed with the warrant, the officers forced open the lock on the closet. Inside the closet, they found a .350 Magnum rifle in a leather case, a 16 gauge shotgun, a pellet rifle and a box containing twelve live rounds of .350 ammunition.

At the January Term, 1978 of the Hillsborough County Superior Court, the Defendant was indicted by the Grand Jury on two counts of "attempted manslaughter". The indictments alleged that on December 31, 1977, the Defendant did recklessly in the nighttime fire a loaded rifle through a plate glass window to the Manchester Police Station, Manchester, New Hampshire, striking Manchester Police Captain Evangelos P. Xiggoros and Dorothy Perreault, causing them both bodily injury. The Defendant was arraigned and entered a plea of not guilty to each charge.

On February 17, 1978, the Defendant filed a motion to suppress all physical evidence seized from the Defendant or his apartment at 83 Manchester Street, Manchester, New Hampshire pursuant to New Hampshire Superior Court Rule 96.* The Defendant alleged in his Motion to Suppress that on December 31, 1977, Officers of the Manchester Police Department illegally broke into and entered his apartment at 83 Manchester Street without probable cause and without a warrant. The Defendant further alleged that a second

*Superior Court Rule 96 provided in pertinent part: "Whenever a motion to suppress evidence is filed before trial in any criminal case, the Court will determine, in its discretion, whether to hear the motion in advance of trial or at trial when the evidence is offered. If a hearing is held in advance of trial, neither the prosecution nor the defendant shall be entitled to a further hearing by the Court on the same issue at the trial. If the evidence is found to be admissible in advance of trial, it will be admitted at the trial without further hearing as to its admissibility.

entry into and search of his apartment, pursuant to a subsequent warrant, was a product of the prior unlawful entry into and search of his apartment. The defendant moved to suppress all evidence seized from his apartment on the grounds that it had been obtained in violation of his rights under the Constitution of the United States.

The Hillsborough Superior Court (Flynn, J.) agreed to hear the Motion to Suppress in advance of trial. A hearing was held before the Court on April 6, 1978. On April 25, 1978, the Court issued an opinion and order denying the Defendant's Motion to Suppress. See Appendix B. The Defendant duly excepted to the Court's ruling on April 26, 1978.

On May 2, 1978, the Defendant filed a Motion for Interlocutory Appeal to the Supreme Court alleging, inter alia, that the granting of the Defendant's Motion to Suppress Evidence would be dispositive of the State's case against the Defendant. The Trial Court (Flynn, J.) granted the Defendant's Motion for Interlocutory Appeal and reserved and transferred to the New Hampshire Supreme Court all questions of law raised by the Motion to Suppress and the Defendant's exception to the denial thereof.

The New Hampshire Supreme Court issued an opinion and order affirming the denial of the Defendant's Motion to Suppress on August 17, 1979 (distributed on September 14, 1979). On September 24, 1979, the Defendant filed a motion in the New Hampshire Supreme Court for rehearing. See Appendix C. In his Motion for Rehearing,

the Defendant alleged that, (1) the Court had erroneously determined that subjective probable cause was not required to justify a warrantless entry and search, (2) that the Court had erroneously determined that a subjective belief in the existence of exigent circumstances was not required to justify a warrantless entry and search, and (3) the Court had erroneously applied the same standard of probable cause for warrantless entries and searches as was pertinent to entries and searches made pursuant to a warrant. On January 4, 1980, (distributed on January 7, 1980) the New Hampshire Supreme Court denied the Defendant's Motion for Rehearing and modified its prior opinion of August 17, 1979. See Appendix A.

ARGUMENT

I. The New Hampshire Supreme Court Erroneously Determined That Sufficient Probable Cause and Exigent Circumstances, In An Objective Sense, Existed To Justify The Warrantless Entry Into And Search Of The Defendant's Apartment.

The general, exploratory search was precisely the type of official misconduct that lay at the heart of the Fourth Amendment to the Constitution of the United States. The historical milieu of the Amendment was aptly described by the Court in Boyd v. United States, 116 U.S. 616, 625, 29 L.Ed. 746, 749 (1886):

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures",

> it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in the English law book" since they had placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugerated the resistance of the Colonies to the oppressions of the mother country.

To the extent that the Fourth Amendment condemns generalized, exploratory warrants, so much the more does it condemn exploratory searches of the type involved in this case conducted without a warrant. Indeed, the Court has held that warrantless searches are per se unreasonable, subject only to certain specific and carefully circumscribed exceptions. E.g., Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 29 L.Ed.2d 564, 576 (1971):

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval of judge or magistrate, are per se unreasonable under the Fourth

> Amendment--subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn" and there must be a "showing by those who seek exemption . . .that the exigencies of the situation made that course imperative." "The burden is on those seeking the exemption to show the need for it."

This case involves the intrusion into a private dwelling, which is "ordinarily afforded the most stringent Fourth Amendment protection". United States v. Martinez-Fuerte, 428 U.S. 543, 29 L.Ed.2d 1116, 1130 (1976); Dorman v. United States, 435 F.2d 385, 389 (U.S. App. DC, 1970). Although the Fourth Amendment "protects people, not places", the home is the place that people have the most legitimate expectation of the privacy which the Amendment was meant to secure. See generally, United States v. Chadwick, 433 US 1, 53 L.Ed.2d 538 (1977); Katz v. United States, 389 US 347, 19 L.ed.2d 576 (1967). Consequently, the magnitude and urgency of the circumstances which purport to justify a warrantless entry into a private home must be significantly greater than those which would authorize a similar invasion of personal rights in a public place. See generally, G.M. Leasing v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977); United States v. Biswell, 406 U.S. 311, 32 L.Ed.2d 87 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L.Ed.2d 60 (1970); See v. City of Seattle, 387 U.S. 541, 18 L.Ed.2d 943 (1947).

In light of the overriding Constitutional preference for prior approval by "neutral and detached magistrates", the law is that warrantless criminal searches and seizures may only be conducted with probable cause and in "exigent circumstances". E.g., G.M. Leasing v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977); Coolidge v. New Hampshire, supra; McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153 (1948). Several categories of "exigent circumstances" have been articulated and deliniated by the courts in their explication of the limits of permissible warrantless searches and seizures. Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782 (1967) (hot pursuit); Ker v. California, 374 U.S.23, 10 L.Ed.2d 726 (1963) (imminent destruction of evidence); Carroll v. United States, 267 U.S. 132, 69 L.Ed.543 (1925) (search of a moveable vehicle on the highway); see Schimel v. California, 395 U.S. 752, 23 L.Ed.2d 685 (1969) (search incident to a lawful arrest); Marron v. United States, 275 U.S. 192, 72 L.Ed. 231 (1927) (plain view); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968) (stop and frisk). All of the "exigent circumstance" types of cases, however, have in common the fundamental notion that, in the absence of consent or otherwise lawful presence upon the premises, warrantless searches and seizures are unconstitutional unless there exists some emergency which mandates immediate action and prevents law enforcement officials from reasonably obtaining a warrant. See generally, Coolidge v. New Hampshire, supra.

Probable cause to seize (or arrest) a person requires information justifying a reasonable belief that a crime has been committed and that the particular person sought to be seized has committed the crime.

By comparison, probable cause for a search of places and for the seizure of things requires information justifying a reasonable belief that specific things consisting of evidence or instrumentalities of a crime are located on the property to which entry is sought. Zurcher v. The Stanford Daily, 436 U.S. 537, 56 L.Ed.2d 525 (1978).

Regardless of the standard to be applied, probable cause did not exist in this case for either an arrest of the defendant or a search of the defendant's apartment. The only element of probable cause which did exist--and quite clearly so--was that a crime had been committed. Probable cause, however, to believe that the defendant had committed the crime, or that the perpetrator (regardless of identity) was present in the defendant's apartment, or that evidence or instrumentalities of the crime were present in the defendant's apartment, was totally lacking.

The fact that for the first hour or more after the shooting, the Manchester Police believed that the shot had been fired from within the Station or from the left front of the Station resulted in the entire area to the right front of the Station, in which the defendant's apartment was located, being left unobserved and unattended. Consequently, any assailant who had fired at the Station from that direction had ample opportunity to flee from the area before the police focused their attention in that direction. This is particularly true since the initial focus of the police reaction and attention for the bulk of the first hour after the shooting was towards the inside of the Station. The "probability" was that if the assailant had fired from the Manchester

Street row of buildings, he had long since fled before Sargent Durette and his Special Reaction Team commenced their search of those buildings at approximately 2:00 a.m.

Assuming arguendo that the police "suspected" that the assailant might still be in the Manchester Street area, they had no probable cause to believe that the assailant was located in the defendant's apartment. Sargent Durette clearly testified that his makeshift attempt to determine the origin of the shot merely drew him in general to the buildings along Manchester Street. Sargent Durette never drew any conclusion that the shot had been fired from any particular building, from any particular store or apartment within a building, or even from within any building as opposed to a rooftop thereof.

Most significantly, the defendant's apartment was located in only the third building searched on Manchester Street. The police had clearly not searched the remaining available sites on Manchester Street before they came to the defendant's apartment. Indeed, the entire search came to a halt when the police arrived at the defendant's apartment and were stymied by the defendant's locked doors.

This case is quite unlike the case of United States v. Scott, 520 F.2d 697 (CA 9, 1975) (2-1 decision), cert. den., 423 U.S. 1056 (1976) in which a so-called "hot pursuit" search was sustained. In that case, the police had evidence that four black males had robbed a bank and had absconded in a car of a particular description and license number. Further information was received that the car was seen approaching

and later was found at an apartment complex and that four black males had been viewed leaving the car and entering the apartment courtyard. The car engine was found to be still warm, indicating that it had recently been driven. A search was then conducted of the entire apartment complex and was eventually narrowed down to one apartment. Police officers knocked loudly on the door, with no response. However, when the officers indicated their intention to enter the apartment, they heard noises inside. At that point, the officers entered the apartment without a warrant and found the alleged culprits.

In that case, the court specifically found that the police officers had probable cause to believe that the fugitives had entered the apartment complex and that, in particular, they were present in the last apartment. Having found that the police were in hot pursuit of the assailants and that the suspects "might well have escaped or concealed evidence", the Court found the warrantless entry of the defendants' apartment to be constitutional.

In the case at bar, however, there are no analogous facts which directed the police officers to this defendant's apartment. The defendant's apartment was encountered merely in the course of a methodical sweep search of every store and apartment in a series of possibly suspect buildings. No information whatsoever had been received by the police from any witness or other source that implicated either the defendant himself or

the defendant's apartment as a likely source for the gunshot. Indeed, Sargent Durette made it apparent in his testimony that such information was irrelevant to him, because he had determined from the very beginning that he would "move down Manchester Street and search every one of these buildings".

The discomfort of the New Hampshire Supréme Court with the lack of focus upon the defendant's apartment is apparent from the record below. In its original opinion of August 17, 1979, the Court stated that,

> By the time [the police] reached the defendant's apartment, they had searched a significant portion of the buildings that had windows facing the police station and had secured the buildings closer to the police station than the defendant's.

Page 7, Appendix A. As the defendant pointed out to the Court in his motion for rehearing, however, the defendant's apartment was located in only the third building searched and the State had offered no evidence as to the number of buildings or apartments involved. Page 3, Appendix C.

Undaunted, the New Hampshire Supreme Court simply denied the Defendant's Motion for Rehearing and modified its opinion to read as follows:

> By the time [the police] reached the defendant's apartment, they had searched a significant number

of these buildings and had secured those buildings which were closer to the police station than the defendant's.

Page 7, Appendix A. The Court's exercise in semantics notwithstanding, there is still no evidence to suggest that the search had narrowed down to the defendant's apartment.

It is important to note that at the time that the police officers arrived at the defendant's apartment, they did have a suspect in mind. The individual believed to have done the shooting was Bruce Perreault, the son of the apparently intended victim, Mrs. Perreault. Indeed, other members of the police force were combing other parts of the City for Bruce Perreault. When Sargent Durette and his Team were unable to gain entrance to the defendant's apartment, they inquired and were informed that the apartment belonged to Thomas Theodosopoulos, not Bruce Perreault. Since the apartment was locked and belonged to someone other than Bruce Perreault, there was essentially nothing to connect this defendant or his apartment to the crime under investigation. United States v. Lindsay, 506 F.2d 166, 171 (US App. DC, 1974); see Ybarra v. Illinois, 48 U.S.L.W. 4023 (November 29, 1979).

Nothing that the police officers learned outside the defendant's doorway indicated the presence of the defendant or any other person inside the apartment. Although a light could be detected under the door coming from one of the rooms on Manchester Street,that did not necessarily indicate

anyone's presence. The equivocal information which the officers received from the downstairs neighbor as to whether the defendant might be at home was irrelevant; the police were not looking for the defendant. Constant and repeated knocking and pounding upon the doors yielded absolutely no response from inside. Despite the fact that the police officers remained outside the defendant's apartment for approximately forty-five minutes, no noises or "muffled sounds" were detected from inside.

As stated by the Sixth Circuit Court of Appeals in a similar case, any suspicion that someone was present "was rebutted to some extent by the fact that the officers had been unable to get a response to intermittent knocking and had heard no sound from inside at all." United States v. Shye, 492 F.2d 886, 890 (CA 6, 1974). Reasonable cause to believe of the existence of anyone inside the apartment was particularly dispelled by the fact that even the audible discussions by Sargent Durette with his men and the Station outside of the defendant's door to the effect that keys to the apartment were being sought and that the search of the other buildings would not be accomplished until this apartment had been searched nevertheless still failed to provoke any sounds whatsoever from within. See United States v. Scott, supra at 699-700.

The fact that Sargent Durette and his Team waited outside the apartment for some thirty minutes while efforts were made to

obtain the keys indisputably demonstrates that he assumed that the assailant was not in the apartment. United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979); United States v. Lindsay, 506 F.2d 166, 172 (US App. DC, 1974). If anything should be obvious, it is that Sargent Durette and his Team would have immediately broken down the defendant's door if they had even the slightest suspicion that the assailant was inside the apartment.

The facts of this case also reveal no "exigent circumstances" to excuse the police from failing to secure that "neutral and detached" judgment of a magistrate and the issuance of a warrant to enter the defendant's apartment. As a result of the mistaken assumption by the police that the shot had been fired from inside the Police Station, the police had already given any possible assailant located in the area of the defendant's apartment the opportunity to flee or secrete any evidence of the crime. That opportunity was repeated when the police commenced their sweep search with the building at the corner of Merrimack and Chestnut Streets, rather than the buildings on Manchester Street, where the defendant's apartment was located.

The initial concern of the police about the possibility of another shot had long since dissipated before their entry into the defendant's apartment. Over two hours had elapsed from the initial incident without any additional shots being fired. Furthermore, the apparent target of the attack, Mrs. Perreault, had been removed to the

hospital immediately after the Station had been declared clear.

The lack of continuing danger was indicated not only by the fact that no second shot was fired, but also by the fact that many of the officers involved in the investigation had exposed themselves as targets for any possible assailant who might still have been inclined to fire another shot. The entire area was illuminated by street lights and the lights to the Station itself had even been turned back on by the time that the police broke into the defendant's apartment. During the sweep search of the Manchester Street buildings, policemen were deployed on both sides of the buildings and were even scaling the fire escapes to search the rooftops. Indeed, Deputy LeBoeuf testified that he himself had walked right in front of the Station on Chestnut Street past the plate glass window through which the bullet had apparently been fired when he entered the Station as early as 1:20 a.m.

During the entire time that Sargent Durette and his Team awaited the key to the defendant's apartment, that apartment was completely surrounded by law enforcement personnel. Police officers were located on Manchester Street and in the back alley. Likewise, Sargent Durette had stationed one of his men in the first floor hallway and another in the second floor hallway. The only entrances and exits to the defendant's apartment were to the third floor hallway, which was occupied by Sargent Durette himself and the balance of his Special Reaction Team.

Unless he had wings, no suspect would have been able to escape from or enter the defendant's apartment, or even the building in which it was located.

Likewise, if anyone located in the defendant's apartment had been inclined to dispose of evidence of the crime, the opportunities for such had long since passed. Sargent Durette and his Special Reaction Team did not arrive in the building until approximately an hour and a half after the shooting. Once there, they made their presence known by conversations among themselves, conversations with Mrs. Berlinguette and repeated banging and pounding upon the defendant's doors with their fists, flashlights and night sticks.

The gist of the "exigent circumstances" exception to the Fourth Amendment's requirement for a warrant is the existence of some emergency requiring immediate reaction by law enforcement officials to the situation in order to apprehend a felon or prevent the destruction of evidence. E.g., Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782 (1967); Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726 (1973); Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543 (1925). See generally, United States v. Matlock, 415 U.S. 164, 178, 39 L.Ed.2d 242, 253 (1974) (dissenting opinion).

> Terms like "exigent circumstances" or "urgent need" are useful in underscoring the heavy burden on the police to show that there was a need that could

> not brook the delay incident to obtaining a warrant, and that it is only in light of those circumstances and that need that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as "unreasonable."

Dorman v. United States, 435 F.2d 385, 392 (US App. DC, 1970).

The mere fact that the delay required to obtain a warrant would result in some "inconvenience" to the police officers is insufficient excuse to bypass the Constitutional requirement for a warrant. Johnson v. United States, 333 U.S. 10, 15, 92 L.Ed. 436, 441 (1948). While the fact that the police officers have the opportunity to obtain a warrant is not alone determinative of the constitutionality of a warrantless search, "it will be fatal unless there are at least some countervailing factors." Niro v. United States, 388 F.2d 535, 539 (CA 2, 1968). Compare, United States v. Rabinowitz, 339 U.S. 56, 98 L.Ed. 653 (1950), with, Trupiano v. United States, 334 U.S. 669, 92 L.Ed. 1663 (1948). In other words, delay in securing a warrant must be for a justifiable reason, such as securing additional evidence to support probable cause, as opposed to utilizing the delay as a subterfuge for avoiding the warrant procedure. Compare, United States v. Ferrara, 539 F.2d 799 (CA 1, 1976), with, United States v. Matlock, 415 U.S. 164, 178, 39 L.Ed.2d 242, 253 (1974)(dissenting opinion), and, United States v. Shye, 492 F.2d 886, 890 n.4 (CA 6, 1974).

The factors to be considered in determining the existence of "exigent circumstances" have probably been best delineated by the case of Dorman v. United States, supra at 392-393, as follows:

> 1. That a grave offense is involved, particularly one that is a crime of violence;
> 2. That the suspect is reasonably believed to be armed;
> 3. That there exists not merely that minimum of probable cause that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information", to believe that the suspect committed the crime involved;
> 4. Strong reason to believe that the suspect is in the premises being entered;
> 5. A likelihood that the suspect will escape if not swiftly apprehended;
> 6. The circumstance that the entry, though not consented, is made peaceably;
> 7. That the entry is made in the daytime.

In the case at bar, the Trial Court stated in its opinion that, "it should be noted that all these considerations were present in this case with the possible exception of the sixth". Page 9, Appendix B. Besides the fact that the Trial Court ignored the seventh criterion outlined in Dorman, the Court was clearly in error in applying the relevant considerations to this case. As has been

demonstrated above, factors three and four relating to probable cause did not exist in this case. Additionally, factors six and seven were obviously not present in that the etnry to the defendant's apartment was a forceable, nighttime intrusion. Finally, factor five could hardly apply in view of the total police control over any and all exits from the defendant's apartment. In summary, the only Dorman criteria satisfied in this case were numbers one and two.

It is instructive to examine the facts of the Dorman case itself to determine the appropriate applicability of its "exigent circumstances" criteria. The case involved an armed robbery, a circumstance which clearly satisifed factors one and two. On the other hand, the probable cause factors (three and four) were overwhelmingly present by virtue of the fact that the defendant in that case had left a copy of his probation report at the scene of the crime which identified his name and address. Although the police entry was at night (factor seven), it was accomplished peaceably (factor six). Finally, when the police arrived and announced to the defendant's mother their intention to enter the premises, they "heard a noise from one of the back bedrooms" indicating the presence of the suspect on the premises and the likelihood that he would escape (factors four and five). Considering therefore that all of the "exigent circumstances" factors enunciated by the Court were present with the exception of a daytime entry, the Court found the warrantless entry into the defendant's home to be constitutional.

Similarly, the Court in Vance v. State of North Carolina, 432 F.2d 984 (CA 4, 1970) applied the Dorman criteria to the facts of that case and found a warrantless entry to be lawful under the Fourth Amendment. Again, the case involved an armed robbery and a concrete identification of the defendant as the perpetrator. In fact, the Court stated that, "the existence of probable cause is so clear that Vance does not contest it." The Court further noted that the defendant was already a fugitive from justice, having absconded from parole, thereby demonstrating the likelihood of his escape. Finally, the police entry into the defendant's rooming house was peaceful and made in the daytime.

Although not expressly following the Dorman criteria, a third case finding the existence of "exigent circumstances" is also illustrative. In United States v. Picariello, 568 F.2d. 222 (CA 1, 1978), the Court legitimized the warrantless entry into the home of a suspect of the 1976 series of New England dynamite bombings. Again, the defendant had been specifically identified as the perpetrator of the crime and probable cause was clear. Furthermore, the entry into the defendant's home was peaceable and made in the daytime. Since the case involved a search for evidence, rather than the person of the defendant, there was no need to consider whether or not there was "strong reason to believe the suspect is in the premises" or "a likelihood that the suspect will escape if not swiftly apprehended". On the other hand, it is important to note that even the warrantless entry that was sustained by the Court was accomplished merely for the purpose of securing the defendant's apartment pending the arrival of a search warrant and that no search was conducted until the warrant arrived.

In addition to the existence of almost all of the relevant Dorman criteria, all three cases cited above have in common one other essential distinguishing factor from the case at bar. In each of those cases, the police had either attempted unsuccessfully to obtain a warrant, were in the process of obtaining a warrant or had actually obtained a defective warrant by the time that they made their warrantless entry into the home of the suspect in question. In Dorman, the police had drawn an affidavit and application for a warrant, but were unable to locate a magistrate to issue the warrant. 435 F.2d 385, 387-388. In Picariello, the police were in the process of preparing the paperwork and obtaining a search warrant when officers were sent to the suspect's home to secure it pending the execution of the warrant. 568 F.2d. 222, 225. Finally, in Vance, the police had in fact obtained a warrant prior to their entry into the suspect's home, but the warrant was defective becauce it had not been issued by a neutral and detached magistrate. 432 F.2d 984, 986-987.

In other words, in each of the three cited cases sustaining "exigent circumstances" searches, the law enforcement officials had demonstrated a good faith attempt to comply with the warrant procedures of the Fourth Amendment. See also, United States v. Ferrara, 539 F.2d 999 (CA 1, 1976). By way of contrast, the police officers in the present case made no attempt whatsoever to obtain a search warrant. The facts clearly indicate that the opportunity to do so existed. Judge Capistran, a local magistrate, was available throughout the evening and was in fact called upon later--after the initial warrantless entry--to issue a search warrant at an early hour of the morning.

The cases are legion in condemning warrantless searches similar to that which occurred here. For example, in United States v. Chadwick, 433 U.S. 1, 53 L.Ed.2d 538 (1977), the Supreme Court determined that a search of a locked footlocker seized at the time of the arrest of two defendants, but not broken into and opened until an hour and one-half later was unlawful. The Court held as follows:

> There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.

53 L.Ed.2d 538, 548. Similarly, in G.M. Leasing Corporation v. United States, 429 U.S. 338, 50 L.Ed.2d 530 (1977), the Court ruled unconstitutional a warrantless entry into a suspect's office one day after police had acquired sufficient facts to establish probable cause, but had forgone the opportunity to obtain a warrant. See also, Chapman v. United States, 365 U.S. 610, 5 L.Ed.2d 828 (1961); McDonald v. United States, 335 U.S. 451, 93 L.Ed. 153 (1948); Trupiano v. United States, 334 U.S. 10, 92 L.Ed. 436 (1948); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948); Taylor v. United States, 286 U.S. 1, 76 L.Ed. 951 (1932).

In United States v. Wilcox, 357 F.Supp. 514 (EDPa. 1973), Government agents investigating a bank robbery obtained solid information as to the identity and home address of the perpetrator. They further

possessed reliable information that the suspect planned to return to that address in order to leave some money for his family and that he then intended to leave town immediately. Despite having such information, the agents made no attempt to secure a search warrant and went instead to the suspect's home to place it under surveillance. Approximately one and a half hours after they had acquired the necessary information, the agents made a peaceable entry into the defendant's apartment. The District Court found an "absence of exigent or exceptional circumstances" and granted the defendant's motion to suppress the fruits of the agents' search of his apartment. See also, United States v. Shye, 493 F.2d 886 (CA 6, 1974); State v. Allen, 113 N.J. Super. 245, 273 A.2d 587 (1970).

As was indicated above with respect to the issue of probable cause, the police officers in the case at bar had no reason to believe that "exigent circumstances" still existed at the time that they broke into the defendant's apartment. The most graphic indication of the lack of any such belief is again the fact that they calmly waited for over one-half hour outside the defendant's apartment while attempts were made to secure keys from the landlord. Quite obviously, Sargent Durette and his Team did not at that point perceive any emergency. If they had, there can be no doubt that they would have immediately broken into the defendant's apartment.

The testimony of Sargene Durette indicates that the warrantless entry into the defendant's apartment was made not on the basis of any urgent crisis, but because the standard operating procedure of the Special Reaction Team required that the apartment be searched. As in the case of United States v. Wilcox, supra at 519:

> Here, the absence of exigent or exceptional circumstances is most clearly demonstrated by the conduct of the agents themselves.

See also, United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979).

II. The New Hampshire Supreme Court Erroneously Applied A Standard of Probable Cause For A Warrantless Entry And Search Of The Defendant's Apartment Which Was No Greater Than That Required To Sustain An Entry Or Search With A Warrant.

The New Hampshire Supreme Court sustained the Trial Court's determination that probable cause existed to believe that "the "thing" sought, the sniper, was located in the place to be entered and searched". Pages 7-8, Appendix A. In so doing, the Court stated that, "the probable cause required for a warrantless search under the exigent circumstances exception is at least as great as that required to support a warrant." Page 6, Appendix A. (Emphasis supplied).

The Court, however, did not purport to utilize any higher standard of probable cause than that required to sustain the issuance of a search or arrest warrant.

The defendant had argued in his brief on appeal before the New Hampshire Supreme Court that the probable cause standard for a warrantless search was indeed more stringent than that applicable to search or arrest warrants. The defendant again specifically raised that issue in his motion for rehearing. Pages 3-4, Appendix C. The New Hampshire Supreme Court, however, denied the defendant's motion for rehearing, without opinion, and merely modified its prior decision and order in other respects.

This Court has not specifically ruled upon the issue. In Recznick v. City of Lorain, 393 U.S. 166, 169-170, 21 L.Ed.2d 317, 321 (1968), the Court utilized the language parroted by the New Hampshire Supreme Court in holding that the degree of probability required in warrantless searches is "at least as much [as] is required to support a search [with] a warrant". (Emphasis supplied) Since the Recznick decision, the Court has not had occasion to directly clarify its opinion on the issue. On the other hand, the Court has held on several occasions that the quantum of probable cause required by the Fourth Amendment may well vary according to the nature of the search at issue. E.g., United States v. U.S. District Court, 407 U.S. 297, 322-323, 32 L.Ed.2d 752, 769-770 (1972); Camera v. Municipal Court, 387 U.S. 523, 534-535, 18 L.Ed.2d 930, 939 (1967).

Several lower courts have specifically addressed themselves to the probable cause element of a warrantless criminal search. For example, the United States Court of Appeals for the District of Columbia Circuit, in the seminal

case of Dorman v. United States, 435 F.2d 385, 392-393 (U.S. App. DC, 1970), described the degree of probable cause required to sustain a warrantless search as follows:

> Third, that there exists not merely the minimum of probable cause that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information" to believe that the suspect committed the crime involved.
>
> Fourth, strong reason to believe that the suspect is in the premises being entered.

The D.C. Circuit further held that if a warrantless entry occurred in the nighttime (as it did in this case), it may, "elevate the degree of probable cause required, both as implicating the suspect and as showing that he is in the place entered". Id. at 393. See also, United States v. Ferrara, 539 F.2d 799 (CA 1, 1976); United States v. Brightwell, 563 F.2d 569, 571 (CA 3, 1977) (Dissenting opinion).

Presently pending before this Court is the case of Riddick v. New York, 45 N.Y. 2d 300, 380 N.E. 2d 224 (1978), prob. jur. noted, 47 U.S.L.W. 3408 (1978). This case squarely presents the issue as to whether or not a warrantless entry into a suspect's home for an arrest of the suspect therein violate the Fourth Amendment if founded upon probable cause, but in the absence of exigent circumstances. It has been suggested that, despite the numerous statements of the Court to the contrary, the issue is still unresolved. E.G., United States v. Watson, 423 U.S. 411, 418, n.6, 46 L.Ed.2d 598 605 (1976). Indeed, there does presently

exist a split of authority on this issue among the Courts of Appeals. Compare, e.g., United States v. Reed, 572 F.2d 412 (CA 2, 1978); Dorman v. United States, supra; with, United States v. Williams, 573 F.2d 348 (CA 5, 1978).

To the extent that this Court should determine, as is argued above, that exigent circumstances did not exist in the case at bar, the same issue may be raised in this case as is presented by the Riddick case. The word "may" is used advisedly because it is by no means clear that the entry into the defendant's apartment in this case for purposes of generally searching for an assailant is the same as an entry into a home for the purpose of arresting a specific, identified individual, such as was the case in Riddick. In any event, the defendant herein strenuously urges the Court not to emasculate its prior decisions and to reaffirm the requirement of exigent circumstances in warrantless entries of citizens' homes.

Whatever the outcome of the Riddick case, it is suggested that the Court ought to clarify the probable cause requirement for warrantless entries into private homes. To the extent that the Court broadens--as is recently has--the exceptions to the warrant requirements of the Fourth Amendment, the Court ought simultaneously to strengthen the requirement of probable cause. It is simply all too easy to intuitively justify a warrantless search by what that search revealed.

If police officers are to be relieved of the responsibility of securing the precedent judgment of a neutral and detached magistrate, the Constitution demands that they be held to a higher standard of certitude that the object or person sought was involved in a criminal act and is present in the place to be entered. As held by the court in Dorman v. United States, supra, this is particularly true when the entry invades a citizen's highest expectation of privacy, i.e., his home at night.

As is argued above, the police officers in this case did not even have enough probable cause to justify the issuance of a warrant. Applying the test of Dorman, they certainly would have been unable to make a "clear showing" or to offer a "strong reason" that the assailant was in this location.

Even assuming--as the defendant does--that the requirement of exigent circumstances to justify warrantless entries will be preserved by this Court, it is not sufficient to secure those rights guaranteed by the Fourth Amendment. In the absence of a warrant, the standard of probable cause should be similar to the sometimes applicable "clear and convincing" burden of proof that lies between "a preponderence of the evidence" and proof "beyond a reasonable doubt."

The excess of zeal induced by the injury to "one of their own" does not excuse the invasion of the rights of other citizens. As the Fourth Circuit recognized in an undoubtedly more egregious, but still not too dissimilar case, the fact of injury to a fellow police

officer does not excuse a blanket, warrantless, residential search not based upon adequate probable cause. Lankford v. Gelston, 364 F.2d 197 (CA 4, 1966).

III. The New Hampshire Supreme Court Erroneously Upheld The Warrantless Entry Into And Search Of The Defendant's Apartment In The Absence Of A Subjective Belief By The Police Officers As To The Existence Of Probable Cause And Exigent Circumstances.

Assuming arguendo that objective probable cause and exigent circumstances existed in this case, it is clear beyond cavil that the police officers involved in the break-in of the defendant's apartment did not themselves believe that the assailant that they were seeking would probably be found within or that an emergency requiring immediate action existed. The testimony is clear that it was the SOP (standard operating procedure) of the Manchester Police Department that dictated the entry into the defendant's apartment.

Sargent Durette testified that he had made the determination to search every single shop and apartment in his path at the time that he commenced his sweep search down Manchester Street. When his Special Reaction Team came to the obstacle presented by the locked doors to the defendant's apartment, the entire sweep search was shut down. This was not because of any belief that the assailant or evidence was located in the defendant's apartment, but because it was standard procedure for his Team not to leave any building and proceed to another until every single apartment or shop had been searched in the first.

Had Sargent Durette believed that the assailant was present in the defendant's apartment, he would have brooked no delay in gaining entry. Instead, he halted his search and directed that an attempt be made to obtain a set of keys for the apartment. Certainly no sense of urgency is revealed by his vigil outside the apartment for approximately one-half hour while awaiting the arrival of the keys. As far as Sargent Durette was concerned, the real search--the search for Bruce Perreault--was proceeding elsewhere in the City.

Even a request from other members of the Team to continue on with the search of other buildings in the suspected area was denied. Again, this was not because of any direct concern with the defendant's apartment, but because it was "our policy and our SOP in building searches."

In its opinion, as originally issued and as modified, the New Hampshire Supreme Court totally ignored the subjective aspect of probable cause and exigent circumstances. The Court stated in its opinion that, "in the present case, it is not our task to review the propriety of the entire sweep search conducted by members of the Manchester Police Department". Page 6, Appendix A. Although the defendant specifically raised the subjectivity issue in his brief on appeal and in his motion for rehearing (Pages 1-2, Appendix C), the Court declined to test the conduct of the police by anything other than an objective standard.

In Terry v. Ohio, 392 U.S. 1, 21-22, 20 L.Ed.2d 889, 906 (1968), the Court held that,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged enforcing the laws can be subjected to the more detached neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

It is clear, therefore, that the facts justifying a search or seizure must, at a minimum, be tested against an objective standard of probable cause.

On the other hand, the Court has not suggested that the absence of subjective probable cause is irrelevant to the dictates of the Fourth Amendment. The Court has merely stated that, "if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate". Beck v. Ohio, 379 U.S. 89, 97 13 L.Ed.2d 142-148 (1964) (Emphasis supplied).

In Baker v. McCollan, ___ US ___, 47 U.S.L.W. 4834, 4835 n.1 (June 26, 1979), the Court noted in its discussion of the requisite mental elements establishing a claim for damages under 42 U.S.C. §1983 for violation of Fourth Amendment rights as follows:

> Of course, the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether §1983 contains some additional qualification of that nature before a defendant may be held to respond in damages under its provisions.

See also, Michigan v. DeFillippo, ___ US ___, 47 U.S.L.W. 4805 (June 25, 1979).

As the Court has stated, "the purpose of the Exclusionary Rule is to deter unlawful police action". Michigan v. DeFillippo, supra at 4807 n.3. It therefore cannot be irrelevant that the police officials who are charged with enforcing the Fourth Amendment engage in warrantless entries of private dwellings when they do not themselves actually believe that probable cause or exigent circumstances exist. So long as law enforcement officers may safely run the risk that the hindsight of a reviewing court may determine that sufficient facts did exist to "give reason" for the entry, they will have no real incentive to restrain themselves in cases of doubt. As the Court stated in Vance v. State of North Carolina, 432 F.2d 984, 991 (CA 4, 1970),

> Although the constitutionality of an arrest must always be objectively

> determined, it is not irrelevant to consider how the conduct of the police may have appeared to them and to the one arrested. For how it seemed to them may tend to affect behavior, and it is lawless behavior that is the concern of the fourth amendment.

The case of Thompson v. Anderson, 447 F.Supp. 584 (D.Md., 1977), is particularly instructive. That case involved a damage claim under 42 U.S.C. §1983 against a police officer who had arrested the plaintiff without a warrant and without probable cause pursuant to the standard operating procedure of the Baltimore Police Department. The practice of the Department was to authorize "try ups", or dwelling searches for specified wanted persons, without seeking a warrant, when the pursuit of the suspect occurred reasonably promptly after the commission of the crime. The Court held that the defendant had reasonably and sincerely relied upon the SOP of the Department and that he was therefore entitled to the so-called good faith defense to a §1983 action. On the other hand, the Court went out of its way to comment upon the impact of the police officer's mental state upon the constitutionality of the arrest (id. at 598):

> These facts, together with absence of malice on Anderson's part toward Keith, his mother or anyone else involved and the following by Anderson of accepted police practice entitle Anderson successfully to assert, on both a subjective and an objective basis, his good faith defense. In so concluding, it would not seem inappropriate for the Court

> to comment then that in its view the law does not constitutionally permit a warrantless entry into a suspect's home unless there is probable cause to believe that the suspect is at home, even in a "hot pursuit" case, except perhaps under exceptional circumstances not present herein . . .While Anderson in ordering that "try up" acted in accordance with Baltimore City Police Department practice and procedure, the latter and Anderson's said order would seem constitutionally deficient.

See also, United States v. Houle, 603 F.2d 1297, 1300 (CA 8, 1979).

The search conducted by Sargent Durette and his Special Reaction Team in this case constitutes the very type of a generalized, exploratory search which goes to the heart of what the Fourth Amendment was meant to protect. Even assuming that sufficient objective facts did exist to establish probable cause and exigent circumstances to justify the forceable entry into the defendant's apartment, the lack of any subjective belief upon the part of the police officers that the assailant was present in that apartment or that an emergency existed should vitiate the legality of the entry. For if the dictates of an SOP can justify a sweep search such as occurred in this case, then the rights of citizens to be "secure in their persons, houses, papers and effects" shall surely be diminished.

It is indeed in the case of a sweep search that subjectivity is particularly relevant. We deal here not with the case of a police officer who has personal doubts as to whether or not the facts amount to probable cause, but a procedure in which the whole issue of probable cause is ignored. It is the inexorable command of the sweep search and the SOP that all buildings, all homes and all apartments be searched, regardless of the circumstances. To test the constitutionality of such official action simply by the use of objective hindsight is not to enforce the Fourth Amendment, but to invite its violation. To repeat the language of the Court in Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 29 L.Ed.2d 564, 576 (1971),

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the value that it represents may appear unrealistic or "extravagant" to some. But the values are those of the authors of our fundamental constitutional concepts. . .If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important.

CONCLUSION

For the reasons stated above, the defendant respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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